IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 141 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
ZIPPERS INDIA - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
NOTICE NOT RECD BACK for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 05/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench, 'B' under section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> *"Whether, the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.1,41,276/- made u/s.37(3A) observing that commission was not included in the provisions of Sec.37(3B)?"*

2 The Assessment Year is 1985-86 and the relevant accounting period is the financial year ended on 31/3/1985. The assessee, a registered partnership firm, claimed certain expenses which included local commission as well as export commission. The Assessing Officer invoked provisions of Section 37(3A) read with Section 37(3B) of the Act and disallowed a sum of Rs.1,41,276/- vide his order

dated 25/3/1998.

3 The assessee carried the matter in appeal before Commissioner (Appeals) who accepted the claim of the assessee by relying upon the Circular issued by Central Board of Direct Taxes on 17/5/1978.

4 The revenue carried the matter in appeal before the Tribunal. The Tribunal after referring to the findings recorded by Commissioner (Appeals) and the Board's circular, followed the ratio of judgment of Calcutta High Court in the case of *Commissioner of Income Tax Vs. Bata India Ltd.(1993) 201 ITR 884* and dismissed the appeal of the department vide order dated 27/8/1993.

5 Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the applicant reiterated the reasons which weighed with the Assessing Officer and submitted that the Tribunal had committed an error in law in deleting the disallowance. The Board shows that the notice issued to the respondent

assessee has not been received back. However, in light of the fact that the Court does not propose to disturb the order of the Tribunal the matter is taken up and disposed of finally.

6 Section 37(3A) of the Act was introduced initially by Finance Act,1978 with effect from 01/04/1979 and came to be deleted with effect from 01/04/1981. Thereafter, once again the provisions were inserted by Finance Act,1983 with effect from 01/04/1984 and were omitted with effect from 01/04/1986 by Finance Act,1985. Therefore, the provisions were operative for Assessment Years 1979-80 and 1980-81 and thereafter for Assessment years 1984-85 and 1985-86.

7 Section 37(3A) of the Act provides that where the expenditure or, as the case may be, the aggregate expenditure incurred by an assessee on any one or more of the items specified in sub-section (3B) exceeds the stipulated limit, twenty percent of such excess shall not be allowed as deduction while

computing the income chargeable under the head "*Profits and gains of business or profession*".

8 Thus, the provision requires that any expenditure incurred on advertisement, or publicity, or sales promotion, exceeds individually, or in the aggregate, the specified limit, twenty percent of such excess shall be disallowed. In other words, all the three items of expenditure are allowable under Section 37(1) of Section 37 of the Act but because of the use of the term " *Notwithstanding anything contained in sub-section (1)*" occurring in the opening part of sub-section (3A) of Section 37 of the Act the specified percentage is disallowed.

9 Section 37(3B) of the Act specifies expenditure vide clauses (i), (ii) & (iii). However, for the present, the material clause is clause (i) which states :"*[(3B) The expenditure referred to in sub-section (3A) is that incurred on – (i) advertisement, publicity and sales promotion; or "*

10 When one considers the meaning and concept of the terms "*advertisement*" and "*publicity*" it is apparent that the term which follows viz. "*sales promotion*" would be required to be assigned the same meaning and concept as is understood in the commercial sense. The basic distinction underlying the term "*sales*" and "*sales promotion*" has to be kept in mind while applying the provision. Any expenditure incurred for effecting sales cannot be termed to be expenditure for sales promotion. In other words, the test would be whether the expenditure is incurred for effecting sales or is it incurred for promoting/enhancing sales by reaching out to potential customers. The expenditure incurred for making sales is a part and parcel of the expenditure for selling the products or the goods in which the assessee trades, while expenditure incurred on sales promotion would be general in nature and relate to creating awareness about the product of the assessee.

11 The decision of Calcutta High Court in the case

of CIT Vs. Bata India Ltd. (supra) on which the Tribunal has placed reliance lays down that the expression “sales promotion” though of wide amplitude and undefined, is to be understood in its meaning in the setting in which it occurs, viz. it necessarily involves an element of advertisement and publicity.

12 In the case of *CIT vs. Gogte Textiles Ltd. (2003) 260 ITR 229* Karnataka High Court has followed the decisions rendered by Calcutta and Kerala High Courts as well as its own decision to lay down that the concept of advertisement, publicity and sales promotion would be by way of providing certain incentive or taking certain other steps by which the product could be popularised to promote sales, however, would not take within its sweep commission paid on sales.

12 In the case of *CIT vs. Print System Products, (2000) 243 ITR 8,* Madras High Court has stated that the difference between sales and sales promotion is

self-evident. Sales promotion expenses are expenses which are not directly related to any single sale, but are expenses aimed at generating interest among potential customers for the purchase of the product. Commission, on the other hand, is paid on the actual sales effected to the person through whose assistance the sale was concluded. Therefore, payment of commission to an agent or a person effecting actual sale and salary paid to the sales personnel for the services rendered would not fall within the meaning of the expression sales promotion.

13 The Commissioner (Appeals) has rightly relied upon departmental circular No.240 dated 17/5/1978. In paragraph No.12.4 of the said circular it is stated :

> *"12.4 As the terms "publicity" and "sales promotion" have a wide amplitude expenditure incurred by taxpayers on fashion shows, beauty contests, consumer contests, consumer gift offers, and free samples or*

gifts will fall within the ambit of new sub-section (3A) of section 37 of the Income-tax Act".

14 Applying the aforesaid principles to the facts concurrently found by Commissioner (Appeals) and Tribunal, it is apparent that the commission paid for local sales as well as for export sales cannot be considered to be sales promotion expenditure for the purpose of disallowance considering the fact that the commission was paid for the services rendered.

15 In the circumstances, the Tribunal was right in law in deleting the addition of Rs.1,41,276/- made u/s. 37(3A) of the Act by treating the commission paid as not falling within the provisions of section 37(3B) of the Act.

16 The question is accordingly answered in the affirmative i.e. in favour of the assessee and against revenue.

17 The Reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-

(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt